BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVELYN I. ROSKOB	)	
Claimant	)	
VS.	)	
	)	Docket No. 259,995
HY-VEE	)	
Respondent	)	
AND	)	
	)	
HAWKEYE SECURITY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the September 9, 2004 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on February 8, 2005.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, respondent's attorney agreed at the time of claimant's accident she was receiving $31.38 per week in additional compensation items for purposes of determining her average weekly wage. At oral argument, the parties also agreed claimant's additional compensation items were probably terminated shortly after January 19, 2001, when she was sent home due to lack of work. Furthermore, the parties agreed claimant's average weekly wage on the date of accident was $388.27, excluding additional compensation items.

ISSUES

This is a claim for a September 30, 2000 accident, when claimant slipped and fell while working for respondent. As a result of that accident, claimant underwent a right hip replacement. Respondent and its insurance carrier do not dispute that the accident arose

out of and in the course of claimant's employment with respondent and that claimant sustained a 30 percent whole body functional impairment due to her injury.

In the September 9, 2004 Award, Judge Foerschler found in pertinent part:

> (1) claimant failed to prove the amount of employer-paid additional compensation items and, therefore, claimant's average weekly wage was $388.27,
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> (2) claimant failed to make a good faith effort to find appropriate employment and, therefore, a post-injury wage based upon $7 per hour should be imputed to her, creating a 26.32 percent wage loss,
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> (3) based upon the opinions of Dr. Danny M. Gurba, claimant lost the ability to perform seven of her 16 former work tasks, creating a 43.75 percent task loss for purposes of K.S.A. 44-510e, and
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> (4) averaging the 43.75 percent task loss with the 26.32 percent wage loss created a 35 percent permanent partial general disability.

The Judge did not address claimant's request for additional temporary total disability benefits.

Claimant contends Judge Foerschler erred. Claimant first argues respondent terminated her fringe benefits in January 2001 and, therefore, the Judge should have increased claimant's average weekly wage by $100 in light of the Judge's prior experience with claims involving additional compensation items. Consequently, claimant contends her average weekly wage for computing her compensation increased to $488.27 sometime in January 2001. Next, claimant argues she is entitled to receive temporary total disability benefits for the period from January 22, 2001, through May 5, 2003, while the Judge awarded those benefits only through April 21, 2003.

Claimant also argues respondent and its insurance carrier should not receive any credit for the temporary total disability benefits previously paid as they presented no evidence that such payments were ever made. And finally, claimant contends she has a 100 percent wage loss and an 81 percent task loss. Accordingly, claimant requests the Board to modify the September 9, 2004 Award and increase her permanent partial general disability.

On the other hand, respondent and its insurance carrier contend the Board should affirm the Judge's finding of a 43.75 percent task loss as it was provided by Dr. Danny M. Gurba, who was a neutral physician. Next, they argue the Judge should have imputed a

post-injury wage of $7.50 per hour, or $300 per week, which would have created a 23 percent wage loss. Accordingly, respondent and its insurance carrier contend claimant has a 44 percent task loss, a 23 percent wage loss, and a 33.5 percent permanent partial general disability.

Respondent and its insurance carrier also argue that claimant's request to increase the average weekly wage by $100 per week based upon the Judge's or Board's experience in other claims is without merit. And finally, they likewise argue that claimant's request to deny them a credit for temporary total disability benefits previously paid is without merit.

The issues before the Board on this appeal are:

1. Did claimant prove the value of additional compensation items or fringe benefits for purposes of computing her average weekly wage?

2. Is claimant entitled to additional temporary total disability benefits for the period from April 22, 2003, through May 5, 2003?

3. What is the nature and extent of claimant's injury and disability?

4. Are respondent and its insurance carrier entitled to receive a credit for temporary total disability benefits previously paid?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds, as follows:

1. Respondent employed claimant as a cook. On September 30, 2000, claimant slipped in water and fell at work, twisting her right hip. The parties stipulated the accident arose out of and in the course of claimant's employment with respondent.

2. Following the accident, claimant obtained medical treatment and in January 2001 began treating with Dr. James Rotramel. In early May 2001, Dr. Rotramel performed a total right hip replacement. After Dr. Rotramel moved to St. Louis, claimant was first referred to Dr. Rotramel's former colleague, Dr. Takacs. But Dr. Takacs was not familiar with the prosthesis used in the hip replacement. Consequently, Drs. Rotramel and Takacs referred claimant to Dr. Michael Huo, who is a hip replacement specialist at the KU Medical Center.

3. Following the right hip replacement surgery, claimant experienced, among others, symptoms of pain and numbness in her right hip and right leg. Claimant testified, in part:

> I had problems with numbness, I had a lot of pain. I had problems with my hip trying to dislocate while I was walking and I had fallen several times. I had cramping, muscle spasms, I had numbing sensations.
>
> I have problems with like my leg is vibrating like a motor running. You can feel the vibration but you can't hear it and it's constant now with that, and I have tingling.[1]

According to claimant, she has fallen approximately 15 times due to her hip "dislocating" or catching.[2]

4. In May 2002, Dr. Huo recommended revision surgery on the right hip as he believed the stem may have come loose and, therefore, needed to be replaced.

5. Respondent and its insurance carrier then referred claimant to Dr. Roger W. Hood, who concluded the revision surgery was not necessary. Consequently, the Judge appointed Dr. Danny M. Gurba, who is an orthopedic surgeon specializing in hip and knee replacements. Dr. Gurba saw claimant in April 2003 and in an April 21, 2003 letter to the Judge concluded it was "somewhat unlikely" claimant's stem was loose. Moreover, Dr. Gurba did not recommend additional surgery on claimant's right hip as the risks outweighed the "fairly low chance of improvement."[3]

6. At the time of the regular hearing, Dr. Gurba was the last doctor claimant had seen who had been authorized. But claimant had seen her personal physician, who had prescribed pain medications for the hip.

7. Following the accident, respondent initially created a sedentary job for claimant, demonstrating foods. Claimant performed that job until January 19, 2001, when she was sent home for lack of work. Claimant was not called back to work and she has not worked since. In November 2003, claimant's attorney wrote respondent's attorney about claimant returning to work. But respondent did not reply. And when

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[1] R.H. Trans. at 14-15.

[2] *Id.* at 18.

[3] Gurba Depo., Ex. C at 2.

claimant testified at the April 2004 regular hearing, she was neither working nor looking for work. Moreover, claimant does not believe she is able to perform any work and has applied for Social Security disability benefits.

> There is no way I could go back and do what I was doing and stand all day for eight hours. There is no way that I could rush to wait on a customer or stoop or do some of the things that are required for a person that works in the kitchen to do.
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> . . . .
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> I'm not qualified to do any sit-down work. I can run a sewing machine but as far as doing office work I'm not educated to do that. All of my education that I do has been in the medical profession [EMT and paramedic training].[4]

8. Claimant saw Dr. Gurba only one time, which was at the Judge's request for a neutral doctor's opinion. According to the doctor, claimant has a 30 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), which, according to the doctor, basically utilizes the Harris hip rating system. The doctor recommended that claimant not lift more than 40 or 50 pounds and only occasionally. Moreover, Dr. Gurba concluded claimant should be allowed to sit and stand as needed to alleviate her pain and she should be limited to primarily sedentary activities. Furthermore, the doctor believed claimant should not climb ladders or stairs, and she should avoid kneeling, stooping, squatting, and other movements requiring hyperflexion of the right hip.

9. At her attorney's request, claimant saw Dr. P. Brent Koprivica to be evaluated for purposes of this claim. Dr. Koprivica saw claimant in early October 2003. The doctor rated claimant also as having a 30 percent whole body functional impairment due to her right hip injury. The doctor recommended that claimant limit her activities to the sedentary physical demand level or less. In addition, Dr. Koprivica believed claimant should be able to sit whenever necessary, avoid standing for more than one hour at a time, and avoid squatting, crawling, kneeling, and climbing.

10. Both Drs. Gurba and Koprivica provided opinions regarding the number of former work tasks that claimant lost due to her right hip injury. In formulating that opinion, both doctors reviewed the list of former work tasks prepared by claimant's vocational expert, Michael J. Dreiling. Dr. Gurba concluded claimant lost the ability

[4] R.H. Trans. at 24-25.

to perform seven of the 16 work tasks, or approximately 44 percent, which claimant performed in the 15-year period before her September 2000 accident. On the other hand, Dr. Koprivica concluded claimant lost the ability to perform 13 of the 16 former tasks, or 81 percent.

11. Regarding claimant's need for future medical treatment, Dr. Gurba testified he would defer to Dr. Horton of the KU Medical Center concerning the need for a hip revision as Dr. Horton was experienced with the type of stem used in claimant's surgery. Likewise, Dr. Koprivica testified he would defer to Drs. Huo and Horton regarding additional surgery but that he thought claimant presently needed the revision after reviewing recent records from Dr. Huo.

12. Only one vocational expert testified, claimant's expert Michael J. Dreiling. Mr. Dreiling interviewed claimant in March 2004 for the purpose of compiling a list of former job tasks claimant performed in the 15-year period before her September 2000 hip injury. Considering Dr. Gurba's medical restrictions, Mr. Dreiling concluded claimant retained the ability to work and earn approximately $7 to $8 per hour in the Kansas City labor market. But Mr. Dreiling was not asked what claimant could be expected to earn in Neosho Falls where claimant moved following her injury and due to the resulting loss of income.

13. Claimant began working for respondent in August 2000. The wage statement introduced at the regular hearing indicated claimant was paid $9.50 per hour. As indicated above, the parties agreed claimant's average weekly wage, excluding fringe benefits or additional compensation items, was $388.27. Claimant testified about receiving fringe benefits from respondent but the record does not establish the value of those additional compensation items. Respondent and its insurance carrier, however, concede those additional compensation items had a value of $31.38 per week.

CONCLUSIONS OF LAW

The evidence is uncontradicted that claimant has sustained a 30 percent whole body functional impairment due to her September 30, 2000 accident and the resulting right hip injury. K.S.A. 44-510e of the Workers Compensation Act provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any**

> **substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability[7] as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The Kansas Court of Appeals in *Watson*[9] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] A permanent partial general disability that is greater than the functional impairment rating.

[8] *Copeland* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

First, the Board concludes claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e as claimant has sustained a hip injury, which is not included in the schedules of K.S.A. 44-510d.

Next, the Board affirms the Judge's finding that claimant has failed to prove that she has made a good faith effort to find appropriate employment and, therefore, a post-injury wage should be imputed to her based upon her retained capacity to earn wages. The Board affirms the Judge's finding that claimant retains the ability to earn $7 per hour. Accordingly, the Board concludes claimant's post-injury wage for purposes of the permanent partial general disability formula of K.S.A. 44-510e is $280 per week.

For purposes of determining claimant's workers compensation benefits, her average weekly wage from the date of accident through January 19, 2001, is $388.27, which excludes the value of her fringe benefits or additional compensation items. But commencing January 20, 2001, the average weekly wage increases to $419.65 as the additional compensation items were discontinued. The Board rejects claimant's contention that the Judge and Board should speculate as to the value of claimant's benefits based upon past experience.

Comparing $419.65 with the imputed post-injury wage of $280 creates a 33 percent wage loss for the period after January 19, 2001.

The Board is not persuaded that the 44 percent task loss opinion provided by Dr. Gurba is any more credible that the 81 percent task loss opinion provided by Dr. Koprivica. Accordingly, the Board gives equal weight to those opinions and concludes claimant's task loss for the permanent partial general disability formula is 63 percent.

Claimant has a 30 percent permanent partial general disability, which is her whole body functional impairment, for the period after her accident through January 19, 2001, her last day of work for respondent. As there is no evidence claimant was earning less than 90 percent of her average weekly wage for that period, claimant is entitled to receive

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[10] *Id.* at Syl. ¶ 4.

benefits for her whole body functional impairment through January 19, 2001. After that date, claimant has a 33 percent wage loss and a 63 percent task loss for a 48 percent permanent partial general disability, except for those weeks that claimant is entitled to receive temporary total disability benefits.

The Board denies claimant's request for additional temporary total disability benefits for the period from April 22, 2003, through May 5, 2003. Claimant failed to prove that she was unable to work during that period.

Although claimant did not present the issue to the Judge, she now requests the Board to deny respondent and its insurance carrier any credit for the temporary total disability benefits it previously paid. The Board denies that request.

First, claimant did not raise that issue to the Judge. Accordingly, the issue cannot be raised for the first time on appeal. This Board's review is limited to the questions of law and fact presented to the administrative law judge.[11] Second, and more importantly, the Workers Compensation Act provides that an employer and its insurance carrier are entitled to a credit for the compensation they paid before the issuance of an award.[12]

AWARD

WHEREFORE, the Board modifies the September 9, 2004 Award, as follows:

Evelyn I. Roskob is granted compensation from Hy-Vee and its insurance carrier for a September 30, 2000 accident and resulting disability.

Based upon an average weekly wage of $388.27, for the period ending January 19, 2001, Ms. Roskob is entitled to receive 15.86 weeks of permanent partial general disability benefits at $258.86 per week, or $4,105.52, for a 30 percent permanent partial general disability.

Based upon an average weekly wage of $419.65, for the period ending April 21, 2003, Ms. Roskob is entitled to receive 117.14 weeks of temporary total disability benefits at $279.78 per week, or $32,773.43.

[11] K.S.A. 44-555c(a).

[12] K.S.A. 44-525(b).

Based upon an average weekly wage of $419.65, commencing April 22, 2003, Ms. Roskob is entitled to receive 134.31 weeks of permanent partial general disability benefits at $279.78 per week, or $37,577.25, for a 48 percent permanent partial general disability.

The total award is $74,456.20.

As of February 15, 2005, Ms. Roskob is entitled to receive 15.86 weeks of permanent partial general disability benefits at $258.86 per week, or $4,105.52, plus 117.14 weeks of temporary total disability benefits at $279.78 per week, or $32,773.43, plus 95.43 weeks of permanent partial general disability benefits at $279.78 per week, or $26,699.41, for a total due and owing of $63,578.36, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $10,877.84 shall be paid at $279.78 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director